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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at 768 F.2d 739, and is reprinted in the appendix to the petition for a writ of certiorari ("Pet. App.") at 1a-13a. The opinion of the United States District Court for the Western District of Louisiana is unreported, and is printed at Pet. App. 16a-24a. The Arbitrator's award at issue is unreported, and is printed at *id.* 25a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 19, 1985. Pet. App. 1a, 7a. A timely petition for rehearing was denied on June 3, 1986. *Id.* 14a-15a. On August 13, 1986, Justice White signed an order extending the time for filing a petition for a writ of certiorari to and including October 1, 1986. *Id.* 54a. On September 22, 1986, Justice White signed an order further extending the time for filing a certiorari petition to and including October 20, 1986. *Id.* 56a. This petition was filed on that date. On January 12, 1987, this Court granted the petition and issued a writ of certiorari. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Company (respondent) and Unions (petitioners) were, at all times relevant here, parties to a collective bargaining agreement covering the production and maintenance employees at the Company's plant in Monroe, Louisiana.[1] The agreement contained a typical grievance-

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[1] Petitioner United Paperworkers International Union, AFL-CIO ("UPIU") is the exclusive bargaining representative of the employees. Petitioner Ouachita Local 654 is affiliated with UPIU. UPIU and the local both were parties to the collective bargaining agreement with the Company.

arbitration provision entitling the Unions to take to arbitration any grievance "arising out of the interpretation or application of the terms of this Agreement." J.A. 15. The agreement declared that the arbitrator's decision "shall be final and binding to both parties of this Agreement." *Id.* 20.

On February 7, 1983, the Company discharged Isiah Cooper, an employee covered by the collective bargaining agreement. Cooper was alleged to have violated a rule promulgated by the Company which listed among the "causes for discharge":

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances. [Pet. App. 31a.]

A grievance was filed protesting the discharge. J.A. 23. The Company responded to the grievance by asserting that Cooper had "violated company rules in being in a car with a lit marijuana cigarette" and it was on that basis that the Company sought to justify the discharge in the grievance procedure. *Id.* 23. The parties were unable to resolve the grievance and the Unions therefore took the matter to arbitration. Under the auspices of the Federal Mediation and Conciliation Service, the parties selected as arbitrator Milden J. Fox, Jr., a professor of industrial engineering at Texas A&M University and an experienced labor arbitrator.[2]

Arbitrator Fox held a hearing on September 26, 1983. The parties stipulated the issue for resolution to be whether "the Company ha[d] just cause to discharge the grievant." Pet. App. 26a. By an opinion dated October 31, 1983, the Arbitrator answered that question in the negative and sustained the grievance.

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[2] *See* BNA, Labor Arbitration Cumulative Digest and Index Covering Volumes 71-80 (1984), pp. 857-58.

The Arbitrator began his reasoning from the traditional labor-arbitration rule that an employer has the burden of proving that a discharge is for just cause. Pet. App. 42a[3] In this case the Arbitrator found that "the only thing the Company has proven is that [Cooper] was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray, a front seat just moments before vacated by another Company employee." *Id.* 50a. "No [witness] testified that he saw anyone smoking a marijuana cigarette," even though the police, with the aid of binoculars, had been observing Cooper during the entire time he was in the car in which the marijuana cigarette was found. *Id.* 49a.[4] Thus, while acknowledging that had the Company proved the charge against Cooper "the Employer's position" would be "reasonable," *id.* 45a, the Arbitrator found that "the Company had not proved by any level of evidence that the Grievant was in violation of the Rule," *id.* 51a. The Arbitrator accordingly ordered that Cooper be reinstated to "his old job or an equivalent job" and be "made whole for lost earnings." *Id.* 52a-53a.

In entering this award, the Arbitrator recognized that, at the arbitration hearing, the Company had, for the first time in the grievance-arbitration procedure, offered evidence of a separate event, of which the Company had not previously been aware, and which was therefore concededly not a basis for the Company's discharge decision: on the day of the incident for which Cooper was discharged, the police had searched Cooper's own car (a

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[3] *See* Elkouri & Elkouri, *How Arbitration Works*, p. 661 (4th ed. 1985) ("the burden is generally held to be on the employer to prove guilt of wrongdoing").

[4] Cooper was under surveillance by police officers who, had obtained a warrant to search Cooper's home. Cooper ultimately pleaded guilty to a charge of possession of marijuana in his home. The district attorney expressly declined to prosecute Cooper for either possession or use of the marijuana cigarette that was found in the car from which Cooper had exited. Pet. App. 8a, 34a-35a, 40a, 50a-51a.

different car from that in which he was sitting prior to arrest) and had found a plastic bag containing marijuana "gleanings" in a microscopic quantity too small to be usable. *Id.* 37a, 46a. In accordance with the often-followed arbitral rule that "the Company must have its proof in hand before it takes disciplinary action against an employee," *id.* 47a,[5] the Arbitrator refused to consider this evidence in determining whether just cause had been established for the discharge. The Arbitrator explained that "[a]n employee should know the offense with which he is charged and have the opportunity to defend his behavior" prior to the arbitral hearing, *id.* 45a, and that an employer should not be allowed to "take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions," *id.* 47a. And this rule, said the Arbitrator, applied with especial force in the instant case as the Company "had a good opportunity to find out about the gleanings evidence," and had failed to do so because of the negligence of one of the Company's supervisors. *Id.*

The Company refused to comply with the arbitration award, but, instead, instituted this lawsuit against the Unions, under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking an order vacating the award. In its complaint, the Company alleged, *inter alia*, that the award contravenes public policy. J.A. 4, 6. The Unions filed a counterclaim seeking enforcement of the arbitration award. *Id.* 10-12.

On cross motions for summary judgment, the District Court ruled for the Company and vacated the Arbitrator's award. The Unions appealed and a divided panel of the Fifth Circuit affirmed; the majority agreed with the District Court that the presence of marijuana gleanings in a bag in Cooper's car meant that the arbitral award

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[5] *See* Elkouri & Elkouri, *supra* n.3, at pp. 675-76 (discharge " 'must stand or fall upon the reason given at the time of discharge'; other reasons may not be added when the case reaches arbitration").

reinstating Cooper contravened the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs and alcohol," Pet. App. 7a:

> The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for Cooper in great part because the employer did not at the time it discharged him know of the marijuana residue that he undeniably brought onto the plant parking lot.
>
> . . . [H]is narrow focus on Cooper's procedural rights has led him to enter an award directing the employer to put Cooper back to operating a hazardous machine, dangerous to himself and to others, at a time when the arbitrator knew that in fact Cooper *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. The public policy involved today is . . . one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy. [Pet. App. 7a; emphasis in opinion].

On January 12, 1987, this Court granted a writ of certiorari to review the Fifth Circuit's decision.

SUMMARY OF ARGUMENT

The Arbitrator in this case, without in any way protecting, authorizing, condoning or sanctioning the possession or use of marijuana by employees, interpreted the just cause requirement of the collective bargaining agreement to demand proof that a discharged employee did commit the offense for which he was discharged (and not some subsequently-discovered offense). It is undisputed that this award " 'draws its essence from the collective bargaining agreement" and that the courts below were "bound to enforce the award" unless the award "violates some explicit public policy." *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764, & 766 (1983).

The public-policy question that is posed here arises in a common situation in labor-management relations: a situation in which public law allows a broad employer discretion in making employment decisions but the employer has agreed in collective bargaining to certain contractual limits on that discretion. The question presented is whether, without securing a modification in the collective agreement through negotiations with the union, the employer, by operation of the federal law of labor contracts, may escape the contractual limits to which the employer agreed and reclaim the very discretion that the collective agreement is designed to limit.

In Part I we show that the national labor policy—which provides the source of the law to be applied in cases, like the instant one, involving the rights and duties of parties to collective bargaining agreements—compels a negative answer to that question and requires the conclusion that an arbitration award may be set aside as against public policy only if the award gives the collective agreement an interpretation that violates positive law. This is true for two reasons: first, only such a rule protects the labor law's preference for private decision-making—in the area left open by public law—to fix the terms and conditions of employment, pp. 13-17 *infra*; and second, only such a rule protects the labor laws' preference for arbitration, rather than economic warfare, as the means of resolving labor-management disputes that arise as to the meaning or application of a collective agreement, pp. 17-24 *infra*. The courts below thus erred in vacating the Arbitrator's award, as that award requires the Company to take an action that the Company is lawfully permitted to take, and does so by reason of the conclusion that the contract establishes requirements the parties were entirely free to establish. Pp. 24-25 *infra*.

In Part II we show that even if the Court were to conclude that the public policy exception to the enforcement of abritration awards is not limited to cases in

which the award conflicts with positive law, the courts below nonetheless erred in vacating the arbitration award in this case.

Under *W.R. Grace* to justify vacating an arbitration award on public policy grounds, the award must give the contract an interpretation that "violates some explicit public policy," one that is "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" 461 U.S. at 766. The court below relied on what it termed the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol." Although that court did not point to any statutory source for the policy, we may assume that the policy rises to the level of an "explicit public policy" within the meaning of *W.R. Grace*. Even on that assumption, the decision below is erroneous, for the Arbitrator's award does not in any sense "violate" that policy.

Without questioning the Company's right to discharge employees who report to work "under the influence of drugs or alcohol," the Arbitrator here found no proof of such a wrong and directed reinstatement of Cooper to "his old job or an equivalent job for which the Grievant is qualified." To conclude that the award violates public policy, the court below assumed: that the job to which Cooper would be reinstated would involve the operation of dangerous machinery; that the Company would lack the means to monitor or supervise Cooper's job performance; and most important of all, that Cooper would report to work under the influence of drugs. None of these assumptions is supported by the record in this case. In particular, the Fifth Circuit's decision rests either on speculation as to Cooper's past conduct or on predictions of future misconduct going far beyond anything in this record. In either event, under *W.R. Grace* far more must be shown before an arbitration award can be found to violate public policy. Pp. 25-30 *infra*.

ARGUMENT

I. In An Action Under § 301, A Court May Not Set Aside An Arbitration Award On Public Policy Grounds Unless The Collective Bargaining Agreement, As Interpreted By The Arbitrator, Violates Positive Law

A. The issue in this case arises in a quite common labor relations context. Like most collective bargaining agreements, the contract between the Unions and the Company here provides a grievance procedure for resolving "[a]ny dispute . . . arising out of the interpretation or application of the terms of this Agreement." J.A. 15. That procedure culminates in arbitration, before "an impartial arbitrator," of any grievance the parties are unable to resolve, *id.* 18-19; the arbitrator's task is to resolve grievances under the contract and he is expressly denied any "power to add to, subtract from or modify any of the terms of the Agreement" or "to substitute his discretion for the employer's discretion in cases where the employer is given discretion by this Agreement," *id.* 19. Thus, as is the norm, the arbitrator is "confined to interpretation and application of the collective bargaining agreement." *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960). And by the terms of the collective agreement, "[t]he decision of the arbitrator shall be final and binding to both parties of this Agreement." J.A. 20. The arbitral process thus "provides the parties with a means of giving content to the collective bargaining agreement and determining their rights and obligations under it." *Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983).

In this case, the Arbitrator, acting pursuant to his authority, concluded that the collective agreement places certain limits on the Company's prerogatives in discharging employees. In particular, the Arbitrator, on the basis of the parties' stipulated statement of the issues, recognized that the agreement allows discharge only for just

cause, and further refined that prohibition by interpreting "just cause" in accord with its ordinary meaning in the labor contract context, *see* n.5, p. 5, *supra*, as requiring proof that the employee committed the offense for which the employee was discharged (and not some subsequently-discovered offense). Based on that interpretation of the agreement—and based on a factual determination that the Company had failed to prove that Cooper was guilty of the offense charged—the Arbitrator concluded that Cooper's discharge was in breach of contract and the Arbitrator ordered the Company to reinstate Cooper with backpay.

As a general rule, so long as an arbitral award " 'draws its essence from the collective bargaining agreement,' a court is bound to enforce the award." *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983). The Arbitrator's award here plainly meets the requirements of that general rule. The award therefore conclusively establishes the meaning of the collective agreement, as "the question of interpretation . . . is a question for the arbitrator;" the "courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 599.

In *W. R. Grace*, the Court recognized a limited exception to the general rule favoring the enforcement of labor arbitration awards: "if the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it." 461 U.S. at 766. The question "of public policy is ultimately one for resolution by the courts." *Id.* And it is the sole question presented herein.

In seeking the answer to that question, we start with certain propositions that are common ground.

First, the Arbitrator has *not* interpreted the collective agreement's just cause requirement to preclude the Com-

pany from discharging an employee for reporting to work under the influence of drugs, for using marijuana during work time, or, even, for possessing marijuana on company property, assuming that the Company is able to prove that the individual is guilty of the offense charged. All that the Arbitrator has held is that to sustain a discharge the Company must prove the offense which was the basis of the discharge, and that the Company failed to meet that burden here.

Second, it is undisputed that the Company was legally free to agree—or not to agree—to a collective agreement containing the restrictions in the contract here as interpreted by the Arbitrator; in other words, the contract, as construed by the Arbitrator, does not offend any legal rule.

Third, it is equally clear that the Company is legally free through collective bargaining to seek to remove the restrictions placed on its employer prerogatives by the present collective agreement.

Finally, there is no doubt that for so long as the collective agreement, as interpreted by the Arbitrator, remains in force, the Company is legally free to abide by that agreement; the Company was not required by any public law to discharge Cooper nor is there any legal prohibition on reemploying him with backpay.

We are faced here, then, with a common situation in labor-management relations: a situation in which public law allows a broad employer discretion in making employment decisions but the employer has agreed, in collective bargaining, to certain contractual limits on that discretion. The question presented is whether, without securing a modification in the collective agreement through negotiations with the union, the employer, by operation of the federal law of labor contracts, may escape the contractual limits to which he agreed and reclaim the very discretion in setting and in implementing employment

conditions that the collective agreement is designed to replace with a set of rules mutually agreed to.

The lower courts answered that question in the affirmative holding that, notwithstanding an employer's contractual undertaking, it is against public policy to compel the employer to retain an employee who has brought "marijuana gleanings" onto the employer's parking lot. The lower courts based their decision on the premise that the judiciary may refuse to enforce a labor arbitration award in situations where the contract itself, as interpreted by the arbitrator, is entirely lawful and the award can be lawfully implemented, but the award requires some action which, in the court's view, diserves some public policy; in this case "[t]he public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol." P. 6, *supra.*

As we proceed to show, this assumption is incorrect; the proper rule in cases arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185—the one required by the national labor policy—is that an arbitration award may be set aside as against public policy only if the award gives the collective agreement an interpretation that violates positive law.

B. Because the question presented here arises under § 301 and concerns the rights and duties of parties to a collective bargaining agreement, "the substantive law to apply," as this Court held in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957), "is federal law, which the courts must fashion from the policy of our national labor laws." More specifically, where, as here, the issue presented is one as to which "express statutory sanction is lack[ing]," the Court's task is to "look[] at the policy of the legislation and fashion[] a remedy that will effectuate that policy." *Id.* at 457.

1. (a) In enacting the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA" or "the Act"), "Con-

gress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of employment." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984). Recognizing that "a single employee [i]s helpless in dealing with [his] employer," *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 148, 209 (1921), Congress endeavored, through the NLRA, to foster a process of collective bargaining which would redress the inequality of bargaining power that exists where employees confront their employers individually, and at the same time would "promote[] industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers," *Labor Board v. American Ins. Co.*, 343 U.S. 395, 401 (1952).[6]

"[A]bsent a collective bargaining agreement," management "hires and fires, pays and promotes, supervises and plans . . . freely except as limited by public law and by the willingness of the employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). Employees thus engage in collective bargaining in order to secure legally-enforceable rights which will "regulate or restrict the exercise" of management's otherwise un-

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[6] *See also, e.g., Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiations with accredited representatives of employees is likely to promote industrial peace"); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) ("The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace"); *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960) ("the policy of Congress is to impose a mutual duty upon the parties to confer in good faith . . . in the belief that such an approach from both sides of the table promoted the overall design of achieving industrial peace").

fettered prerogatives. *Id.* Because employers generally seek to preserve their prerogatives, the collective bargain-in grelationship is an adversarial one in which the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Labor Board v. Insurance Agents, supra*, 361 U.S. at 488.

Nothing in the Act seeks to dictate a particular resolution of this conflict between labor and management or to dictate in which respects (if any) management's powers will be limited by contract. As this Court has stated, "the fundamental premise on which the Act is based [is] *private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.*" *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (emphasis added). "The goal of federal labor policy" is thus "to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations. . . . The purposes of the Act are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).[7]

A corollary of the national labor policy's strong emphasis on private decision-making in the establishment of terms and conditions of employment is a corresponding limitation on the role of the judiciary in § 301 cases. The Court enunciated this liimtation in *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982): "when neither the collective bargaining process

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[7] *See also, e.g., Labor Board v. Insurance Agents, supra*, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences"); *H. K. Porter Co. v. NLRB, supra*, 397 U.S. at 108 ("the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties").

nor its end product violates any command of Congress, *a federal court has no authority to modify the substantive terms of a collective bargaining contract*" (emphasis added). *See also Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1980) ("If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution").

(b) The expansive public policy exception adopted by the court below—an exception that allows courts to refuse to enforce *lawful* collective bargaining agreements—flies in the teeth of the policy favoring free collective bargaining. If a collective agreement (as interpreted by an arbitrator) is lawful, then, by hypothesis, the employer is, as a matter of public law, free to act in conformity with the agreement, or to act in the opposite manner. To refuse to enforce an award compelling compliance with the agreement thus substitutes for a rule negotiated through the collective bargaining system, a regime in which the employer exercises absolute and unlimited power. It is difficult to understand what public policy it is that is advanced by vesting such discretion in employers. And it is beyond dispute that the *national labor policy* is fundamentally undermined by the failure to honor the parties' collectively-bargained resolution of an issue they were free to resolve, and by the return to the employer of the very unfettered discretion the collective agreement is designed to limit.

The instant case illustrates the point well. Under the NLRA, the parties had a duty to bargain over the subject of when and how employees would be discharged. The parties did so, and reached an entirely lawful resolution of that matter; a resolution that imposed certain limitations on *all* discharges. Yet the lower courts have held that in certain categories of cases—at least those involving possession or use of drugs or alcohol—the parties' contract is not enforceable, and that the employer

in such cases is free to decide on its own whether to discharge or otherwise discipline the employee.

In so doing, it must be emphasized that the lower courts did *not* preclude the Company, or any other employer, from employing Cooper, or any similarly-situated employee, to operate dangerous machinery. To the contrary, this Company, and all other employers, remain free to employ (or reemploy) such persons at will. The decision below thus may have no effect whatsoever on the types of jobs held by persons found possessing marijuana. Nor did the courts below even require the Company, or employers generally, to demonstrate, as a precondition to overturning an arbitral award, that the discharge at issue was based on the use of marijuana in a way that affects the employee's job performance or, indeed, on actual use at all. Under the decision below, possession of any amount of marijuana or alcohol, for any reason, at any time sufficies to subject the employee to unlimited employment discipline if that is the employer's will. The decision below thus assures, in such circumstances, that employees will have no legally-enforceable rights, but rather will be subject to their employer's judgment, whatever it is. In this way the public policy exception adopted by the courts below cuts deeply into the core aim of the national labor policy: to subject matters having to do with the terms and conditions of employment to the mediating influence of collective bargaining.

The same adverse consequences do not flow from recognizing a public policy exception under which the courts refuse to enforce arbitration awards only where those awards render the collective agreement itself unlawful. Nothing in the national labor policy requires a court to enforce a contract wihch "violates any command of Congress" or any command of a state legislature acting within the scope of its authority. *UMWA Health & Retirement Funds v. Robinson, supra*, 455 U.S. at 576. Absent a collective agreement, an employer's prerogatives

are "limited by public law," *Steelworkers v. Warrior & Gulf, supra*, 386 U.S. at 583, and the national labor policy "does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985).[8] Thus, § 301 comfortably accommodates a public policy exception that makes an arbitral award unenforceable where the arbitrator's interpretation of a labor contract renders the contract *unlawful*.

2. The broad public policy exception embraced by the courts below offends a second core aspect of the national labor policy: the "strong federal policy favoring arbitration of labor disputes." *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974). This preference for arbitration rests on basic principles concerning the administration of collective bargaining agreements which we now elaborate.

Under the NLRA, the collective bargaining process does not come to an end when the collective agreement has been negotiated; far from it. Although the "labor agreement may attempt to regulate all aspects of the complicated relationship [between employer, employee and union] from the most crucial to the most minute over an extended period of time," the "breadth of the matters covered as well as the need for a fairly concise and readable instrument" assure that the contract will not self-evidently answer all questions of labor-management relations that arise during its term. *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 580. Disputes as to how (or even whether) the collective agreement is to be applied to various disputes are inevitable.

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[8] The national labor policy does have something to say about the extent to which the states are free to overide the substantive terms of a collective bargaining agreement. *Compare, e.g., Teamsters Union v. Oliver, supra, with Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). There is no occasion to address that issue here, however, as it is undisputed that the arbitral award in this case does *not* violate Louisiana law.

For that reason, "[c]ollective bargaining is a continuous process." *Conley v. Gibson*, 335 U.S. 41, 46 (1957). NLRA § 8(d), 29 U.S.C. § 158(d), obligates the parties to "confer in good faith" not only "with respect to . . . the negotiation of an agreement" but also "with respect to . . . any question arising thereunder." That duty extends to "day-to-day adjustments in the contract and other working rules, the resolution of new problems not covered by existing agreements, and the protection of employee rights secured by contract." *Conley v. Gibson*, *supra*, 335 U.S. at 46.[9]

In theory, the ongoing nature of the collective bargaining process could mean ongoing economic strife. This is true for a very simple reason: "the use of economic pressure . . . is part and parcel of the process of collective bargaining," *Labor Board v. Insurance Agents*, *supra*, 361 U.S. at 494; "economic pressure devices" are the means by which each party in collective bargaining "make[s] the other party incline to agree on one's terms," *id.* at 489.[10] Thus, it would be entirely consistent with the labor laws' emphasis on collective bargaining for each problem that arises during the term of a collective agreement—for example, each discharge or each disciplinary action—to become the occasion for a strike, slowdown, or lockout.

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[9] *See also, e.g., NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) ("The duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement").

[10] *See also, e.g., Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 147 (1976) ("Resort to economic weapons should other peaceful measure not avail is the right of the employer as well as the employee"); *Belknap Inc. v. Hale*, 463 U.S. 491, 500 (1983) ("the federal law intended to leave the employer and union free to use their economic weapons against one another"); *Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, 54 L.W. 4329, 4331 (April 1, 1986) ("The parties' resort to economic pressure [i]s a legitimate part of their collective bargaining process").

To minimize that possibility, "the basic policy of national labor legislation," stated in LMRA § 203(d), 29 U.S.C. § 173(d),[11] "is to promote arbitration as a substitute for economic warfare." *Teamsters Local v. Lucas Flour Co., supra*, 369 U.S. at 105. The arbitral system allows disputes to be resolved under the "rule of law" rather than "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength at any given moment of the contending forces." *Steelworkers v. Warrior and Gulf Co., supra*, 363 U.S. at 580. Arbitrators thus serve "as indispensible agencies in [the] continuous collective bargaining process," *Steelworkers v. Enterprise Corp., supra*, 363 U.S. at 597; through arbitration "meaning and context are given to the collective bargaining agreement," *Steelworkers v. Warrior & Gulf Co., supra* 363 U.S. at 591.[12]

Once again, this "strong congressional preference for private dispute settlement mechanisms agreed upon by the parties," *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 407 (1976), implies a corresponding limitation on the judicial role. As stated in *Warrior & Gulf*, the "judiciary sits in these cases to bring into operation an arbitration process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." 363 U.S. at 585. This aim "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play," for "[a]rbitration is a stabilizing in-

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[11] LMRA § 203(d) provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

[12] *See also, e.g., Boys Market v. Clerks Union*, 397 U.S. 235, 251-52 (1970); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981); *Bowen v. United States Parcel Service, supra*, 459 U.S. at 224-25.

fluence only as it serves as a vehicle for handling any and all disputes that arise under this agreement." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

(b) If, as the courts below held, the judiciary were free under § 301 to invoke public policy to refuse to enforce arbitral awards which do not violate positive law, the federal policy favoring "arbitration as a substitute for economic warfare," *Teamsters Local v. Lucas Flour Co., supra*, 369 U.S. at 105, would be gravely disserved. Under such a regime, there would be a category of labor-management disputes (for example, disputes over the discipline of an employee accused of marijuana possession) in which the resolution desired by the union (reinstatement) would be entirely lawful but in which, regardless of the merits of its contract position, the union would be unable to secure the relief sought through the "rule of law" because that relief, in the judiciary's view, disserved public policy. In such cases, the *only* avenue open to the union to press its lawful position—to secure reinstatement—would be economic warfare. Necessarily, such a regime would at the very least lead to increased labor strife in cases falling within this category, *viz.*, cases covered by the expansive public policy exception.[13]

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[13] In this respect, the consequences of holding a collective bargaining agreement to be contrary to public policy are typically quite different from the consequences of such a holding with respect to other types of contracts.

Outside of the collective bargaining context, "[w]hen most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties." *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 580. It follows that, in other contexts, where a contract is deemed violative of public policy, the parties are free to walk away from each other or, if they mutually desire, to negotiate a new agreement in the normal way voluntary agreements are reached.

In the labor context, however, "[t]he choice is generally not between entering or refusing to enter into a relationship, for that in

Moreover, the end result of the theory adopted by the lower courts would be to greatly reduce the overall utility of arbitration as a means of resolving labor disputes generally. To borrow words Archibald Cox wrote in a different context, the public policy exception, as defined by the courts below, "once loosed, is not easily cabined." [14] If courts were free to refuse to enforce arbitration awards based on the judiciary's own views of whether the award disserved a recognized public policy, it would be all too easy for the courts, in the guise of applying this exception, to second-guess arbitrators concerning their factual findings and contract interpretations.

That may well be the best explanation for the result reached by the court below; its opinion is dripping with contempt for the Arbitrator's conclusion that Cooper had not been proven to be guilty of the offense, possessing a lit marijuana cigarette, with which he was charged by the Company. *See* Pet. App. at 1a, 3a, n.2, 7a. And it is difficult to believe that it was the mere presence of marijuana gleanings in a bag in Cooper's car that led that court to conclude that Cooper's reinstatement offended public policy. Other appellate court opinion in which arbitral awards have been vacated on public policy grounds likewise contain strong indications that, at bottom, the

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all probability preexists the negotiation," *id.*; thus the collective agreement "is not in any real sense the simple produce of a consensual relationship," *John Wiley & Sons v. Livingston, supra,* 376 U.S. at 550. And if a collective agreement were deemed violative of public policy, the parties still would be *obligated* to deal with each other and in doing so would have to confront each other's economic power in resolving the matter at hand.

Thus here, as in so many other areas arising under § 301, "principles of ordinary contract law" do not provide a nice fit. *See Bowen v. United States Postal Service, supra,* 459 U.S. at 224.

[14] Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv.L.Rev. 91, 91 (1966).

courts differed with the manner in which the arbitrator had found the facts and/or construed the contract.[15]

In all events, at least this much is clear: the amorphous public policy exception adopted by the lower courts leaves a great deal of room for such second-guessing of arbitration decisions, and would in that way "make meaningless provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 599. And an arbitral system whose results are not final is unlikely to survive as a means of labor dispute resolution.

In addition, regardless of whether the courts were to resist this temptation to second-guess arbitration, it nonetheless would be true that under the Fifth Circuit's ex-

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[15] For example, in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the prior Fifth Circuit decision involving the public policy exception which the court below relied on in this case, that court concluded that "an award which compels the reinstatement to driving duties of a truck driver who admittedly drank while on duty, would violate . . . public policy"; specifically, "the public policy of preventing people from drinking and driving." *Id.* at 125.

But all that the arbitrator in that case had found the grievant "admitted" was "tak[ing] a drink at his last preceding rest stop" where grievant had spent the night at the end of the first day of his Fort Worth to California trip; indeed the grievant's testimony, as recited by the arbitrator, was that the grievant had taken his last drink more than five hours before resuming driving. (We are lodging a copy of the arbitrator's decision in *Great Western Food* with the Clerk of the Court.) And while the Fifth Circuit in *Great Western Food* correctly stated that grievant had been "cited . . . for 'drinking intoxicating liquor while on duty or within 4 hours prior,'" 712 F.2d at 123, that court failed to note the arbitrator's finding that "the drinking on duty charge" had been "dismiss[ed]" in a prior judicial proceeding.

Thus, the premise on which the Fifth Circuit vacated the arbitral award in *Amalgamated Meat Cutters*—that the grievant had been drinking while on duty—is not consistent with the facts as found by the arbitrator.

pansive public policy exception, there would be countless arbitral awards which could be said to raise a public poilcy issue, and in which the outcome of a challenged based on that issue could not be predicted by the parties with any degree of certainty. In these circumstances, there would be a strong temptation for the losing party in arbitration to resist the award and to shop for a favorable judicial decision.[16] Thus, regardless of the outcome of particular cases, the indefinite nature of the public policy exception adopted by the lower courts would undermine the finality of arbitral awards, thereby further diminishing the value of the arbitral process.

These results would *not* follow if the public policy exception were confined to cases in which the arbitral award rendered the contract unlawful. Such an exception would be subject to objective application and review and thus would not invite large numbers of challenges to arbitration decisions. Nor could such an objective rule be used, *sub silentio*, as a means of second-guessing arbitration awards. And, under such an exception, the only category of cases in which arbitration would not be available to a

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[16] *United States Postal Service v. Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1986), is illustrative. In that case, the arbitrator held that a provision in the collective bargaining agreement requiring management to exercise its authority "consistent with applicable laws" required management to comply with a Tennessee statute under which employees called for jury duty are to be paid their regular wages by their employer. Relying on cases such as the decision below in the instant case which gave a sweeping reading to the public policy exception, the Postal Service refused to comply with the arbitration award, contending, *inter alia*, that the award "is contrary to a well-defined policy . . . under which the Postal Services' operations are not to be subjected to a patchwork of conflicting state laws." *Six years* after the employee's grievance was filed, the District of Columbia Circuit rejected the Postal Service's argument and enforced the arbitration award.

union as a means of securing a desired end would be cases in which the end being sought is itself unlawful, and thus could not be secured through *any* means. Accordingly, a public policy exception limited to cases of illegality would not undermine the national labor policy's preference for arbitration as a means of resolving labor disputes whereas the broader exception advanced by the courts below does threaten that policy.

3. In sum, the rule that best "effectuate[s]" the national labor policy, *Textile Workers v. Lincoln Mills*, *supra*, 353 U.S. at 457, in this: an arbitration award is not to be vacated on public policy grounds unless the award interprets the collective bargaining agreement in a manner that renders the agreement unlawful. Such a rule protects the free collective bargaining system and the federal preference for arbitration as a means of dispute resolution. And such a rule, at the same time, leaves it open to Congress, and to the states within the limits of their powers, to regulate the employment relationship —for example, to proscribe the employment of certain categories of persons or to establish licensing or other prerequisites for certain jobs—and thereby to override private agreements. But within the parameters left open by public law, private parties would be free, in collective bargaining, to reach their own agreements and, so long as the agreement is lawful, to enforce their contract rights through the grievance-arbitration machinery.

C. Under the rule just stated, the courts below erred in vacating the Arbitrator's award here. The Arbitrator entered an award that requires the Company to take an action that the Company is lawfully permitted to take (and that the Union could have exerted economic pressure to secure): reinstating Cooper. Nothing in federal law, or in Louisiana law, makes it unlawful to employ or reemploy one who has possessed marijuana on

(or off) an employer's premises. The Company was not required to discharge Cooper originally and the Company is not precluded from reinstating him.

The Arbitrator entered the challenged award based on his conclusions: that the collective agreement requires proof of the offense for which the employee was discharged; and that evidence of an employee's presence in the back seat of a car, the front seat of which had recently been vacated by another individual and the front ashtray of which contains a marijuana cigarette, does not established that the discharged employee possessed the marijuana. Neither of these conclusions is inconsistent with positive law; the parties were entirely free to reach a collective agreement that placed such limits on the Company's discharge power and it was the Arbitrator's judgment that the parties, in fact, had done so. Accordingly, the award should be enforced.

II. Even If The Public Policy Exception Were Not Properly Limited To Cases Involving A Conflict With Positive Law, The Courts Below Erred In Vacating The Arbitration Award In This Case

If the Court were to conclude, contrary to our argument in Part I, that the public policy exception is not limited to cases in which an arbitration award conflicts with positive law, the Court then would face two related questions: what are the limits of the public policy exception, and were such limits transgressed in this case. It is to those questions that we now turn.

Although this Court first recognized the public policy exception in *W.R. Grace*, that case does not define the parameters of that exception, nor has the Court done so in any subsequent case. *W.R. Grace* does state one limiting principle, however: to justify vacating an arbi-

tration award on public policy grounds, the award must give the contract an interpretation that "violates some explicit public policy," one that "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" 461 U.S. at 766.

There is no doubt that it is against the "explicit public policy" of Louisiana for any individual to possess marijuana within the State; La. Rev. Stat. § 966(D) makes possession of marijuana a criminal offense. But that statute also defines the penalties for this offense and that policy is "vindicated . . . by a criminal conviction and the judicial imposition of a penalty," *Electrical Workers Local 453 v. Otis Elevator Co.*, 214 F.2d 25, 29 (2d Cir. 1963) (Marshall, J.). The loss of employment is *not* one of the sanctions provided by Louisiana law for one convicted of possession of marijuana. And not even the courts below suggested that the public policy embodied in the Louisiana criminal law precludes the continued employment of one found possessing marijuana or precludes the enforcement of an arbitration award compelling the reinstatement of such an individual.

The court below instead relied on what it termed the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol." That court did not point to any statutory source for that policy.[17] Nonetheless we may assume,

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[17] The Fifth Circuit instead relied as its prior decision in *Amalgamated Meat Cutters v. Great Western Food Co.*, *supra* n.15. But that case involved a truck driver who was discharged for drinking, and the Fifth Circuit there relied on the Federal Motor Carrier Safety Regulations which expressly address the use of alcohol by truck drivers. *See* 712 F.2d at 125. Thus, whatever the merits of the decision in *Amalgamated Meat Cutters*, *see* n.15 *supra*, that

at least for present purposes, that preventing those under the influence of drugs or alcohol from operating dangerous machinery is more than a "supposed public interest" and rises to the level of an "explicit public policy" within the meaning of *W.R. Grace*. For, in all events, it is clear that the Arbitrator's award here does not "violate[]" that policy, *W.R. Grace*, 461 U.S. at 766, and hence is entitled to enforcement.

The Court's opinion in *W.R. Grace* illustrates the type and degree of conflict between an arbitral award and "explicit public policy" that is required before a court is justified in setting aside the award as violative of that policy. *W.R. Grace* involved an arbitral decision requiring an employer to compensate employees who the employer had laid off out of seniority order in violation of the seniority provisions of the applicable collective bargaining agreement. The employees had been selected for layoffs pursuant to a judicially-approved conciliation agreement between the employer and the Equal Employment Opportunity Commission which agreement required the employer to maintain the existing proportion of women in the plant during any reduction in force. The employer claimed that the arbitral award should not be enforced in light of the public policy favoring "obedience to judicial orders." 461 U.S. at 766. This Court disagreed and enforced the arbitration award.

In reaching this result the Court recognized that "obedience to judicial orders is an important public policy." *Id.* And, there was undeniably some tension between that policy and the arbitration award at issue in *W.R. Grace*; the award required backpay of the employer to compenstate those disadvantaged by the employer's compliance with the court-approved conciliation agreement. Nonethe-

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decision provides no support for the public policy invoked by the court below in the instant case.

less the Court concluded that such a tension is *not* sufficient to justify vacating an arbitration award. The Court stressed that the *W. R. Grace* arbitration award did not "require[] that layoffs be conducted according to the collective-bargaining agreement" but "simply held, retrospectively, that the employees were entitled to damages." *Id.* at 768-69. And the Court concluded that

> [e]nforcement of [the arbitration] award will not create intolerable incentives to disobey court orders. Courts have sufficient contempt powers to protect their injunctions, even if the injunctions are issued erroneously. In addition to contempt sanctions, the Company here was faced with possible Title VII liability if it departed from the conciliation agreement in conducting its layoffs. [*Id.* at 769-70]

W.R. Grace thus indicates that a clear and irreconcilable conflict between an arbitral award and explicit public policy must be established before the award can be said to *violate* such a policy.

In this case, no such conflict has been shown to exist between the award and the public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol. To begin with, the Arbitrator has *not* held that the collective agreement precludes the discharge of an employee who has reported to work while under the influence of drugs or alcohol. Nor has the Arbitrator ordered the reinstatement of an employee who has been proven to have reported to work while under the influnce. The Arbitrator's decision thus does not in any way protect, authorize, condone or sanction reporting to work while under the influence of drugs or alcohol. The award simply requires the Company to meet the normal labor arbitration proof requirement for showing the offence on which the discharge was based.

The Arbitrator's award does, to be sure, require that Cooper be reinstated to "his old job or an equivalent job for which the Grievant is qualified." In order to conclude

that this award violates the "public policy . . . against the operation of dangerous machinery by persons under the influence of drugs," the Fifth Circuit was required to make the following assumptions. First that court necessarily assumed that any "equivalent job" Cooper might be offered would require Cooper to "operate dangerous machinery." Second, the court below must have assumed that the Company would lack the means to monitor or supervise Cooper so as to assure that he did not perform such duties while under the influence of marijuana. Third and finally, that court assumed that after being reinstated, Cooper would report to work "under the influence of drugs."

None of these assumptions is supported by the record in this case. The record is completely silent with respect to the type of "equivalent" jobs that might be offered Cooper, and with respect to the type of supervision, monitoring, or drug-testing to which Cooper might be subject after reinstatement. And the record provides no sound basis for concluding that, if reinstated, Cooper would report to work in an impaired state.

Given the Arbitrator's findings—specifically, that Cooper had *not* been in possession of the lit marijuana cigarette found in another employee's car—the sole reason the Fifth Circuit offered, or could offer, for assuming that Cooper would report to work in an impaired state, was the fact that marijuana gleanings were found in a bag in Cooper's car while the vehicle was on company property. But the presence of the gleanings does not say that Cooper had ever reported to work in an impaired state and there is no proof (or finding) that the gleanings resulted from on-premises or on-the-job use of marijuana.

Thus the Fifth Circuit's refusal to enforce the arbitration award rests either on *speculation* as to Cooper's past conduct, or else on *predictions* of future misconduct going far beyond anything in the record. In either event, this

Court's *W.R. Grace* decision makes it plain that far more must be shown before an arbitration award can be found to violate public policy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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